No. SC07-1074

IN THE SUPREME COURT
OF THE STATE OF FLORIDA
UNITED STATES OF AMERICA, et al.,
Defendants-Appellants.

v.

MAUREEN STEVENS, etc.,
Plaintiff-Appellee.
On Certified Question From The United States
Court of Appeals For The Eleventh Circuit

REPLY BRIEF FOR APPELLANT THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

Page

I. FLORIDA LAW IMPOSES NO DUTY TO PREVENT A THIRD-PARTY ATTACK ON A STRANGER 1

II. PLAINTIFF CANNOT EVADE THE NO-DUTY RULE 9

CONCLUSION 15

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases: **Page**

Aguila v. Hilton, Inc., 878 So. 2d 392 (Fla. 1st DCA) 7

Everton v. Willard, 468 So. 2d 936, 938 (Fla. 1985) 5

Gallara v. Kokovich, 836 A. 2d 840 (N.J. Super. 2003) 12

Gross v. Family Servs. Agency, Inc., 716 So. 2d 337 (Fla. 4th DCA 1998), *aff'd sub nom. Nova Southeastern Univ., Inc. v. Gross*, 758 So. 2d 86 (Fla. 2000) 6, 7

Grunow v. Valor Corp., 904 So. 2d 551 (Fla. 4th DCA), *review denied*, 918 So. 2d 292 (Fla. 2005) 2-5, 7, 8, 10, 12, 14

Heist v. Lock & Gunsmith, Inc., 417 So. 2d 1041 (Fla. 1st DCA 1982) 3, 4

Henderson v. Bowden, 737 So. 2d 532 (Fla. 1999) 7

Hewitt v. Avis Rent-A-Car System, Inc., 912 So. 2d 682 (Fla. 1st DCA 2005) 7, 8

Horne v. Vic Potamkin Chevrolet, Inc., 533 So. 2d 261 (Fla. 1988) 7

J.G. Christopher Co. v. Russell, 58 So. 45 (1912) 9

Keenan v. Oshman Sporting Goods, Co., 629 So. 2d 210 (Fla. 5th DCA 1993) (per curiam) 2-4, 10, 12

Kitchen v. K-Mart, 697 So. 2d 261 (Fla. 1997) 3

Laird v. Nelms, 406 U.S. 797 (1972) 11

Lighthouse Mission of Orlando, Inc. v. Estate of McGowen, 683 So. 2d 1086 (Fla. 5th DCA 1996), *review denied*, 697 So. 2d 510 (Fla. 1997) 5, 7

Loftin v. McCrainie, 47 So. 2d 298 (Fla. 1950) 10

Mathis v. American Fire & Cas. Co., 505 So. 2d 652 (Fla. 2d DCA 1987) 3, 4

McCain v. Florida Power Corp., 593 So. 2d 500 (Fla. 1992) 9, 14

Michael & Philip, Inc. v. Sierra, 776 So. 2d 294 (Fla. 4th DCA 2000),
review denied, 792 So. 2d 1215 (Fla 2001) 6, 7, 8

Pardo v. State, 596 So. 2d 665 (Fla. 1992) 2

Scorza v. Martinez, 683 So. 2d 1115 (Fla. 4th DCA 1996) 10

In re September 11 Litigation, 280 F. Supp. 2d 279 (S.D.N.Y 2003) 12

Stanfill v. State, 384 So. 2d 141 (Fla. 1980) 2

Trespalacios v. Valor Corp. of Florida, 486 So. 2d 649
(Fla. 3d DCA 1986) 3, 4

Trianon Park Condo. Ass'n v. City of Hialeah, 468 So. 2d 912
(Fla. 1985) 1, 5

Whitt v. Silverman, 788 So. 2d 210 (Fla. 2001) 7

Statutes:

Antiterrorism and Effective Death Penalty Act of 1996,
Pub. L. 104-132 § 511(a)(4) (April 24, 1996), 110 Stat. 1284 13

Miscellaneous:

Restatement (Second) of Torts § 302 (1965) 11, 12
Restatement (Second) of Torts § 302A (1965) 11
Restatement (Second) of Torts § 302B (1965) 7, 8, 11, 12
Restatement (Second) of Torts § 314 (1965) 13

Restatement (Second) of Torts § 315 (1965)..2

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REPLY BRIEF FOR APPELLANT THE UNITED STATES OF AMERICA

The government's initial brief explained that Florida law does not impose a duty to prevent a third-party criminal from attacking a stranger. Plaintiff's answer brief does not dispute that point, but instead seeks to recharacterize that legal principle, and to suggest that it does not encompass her allegations here. Neither effort can succeed, as this case is firmly within the no-duty rule. Indeed, plaintiff's allegations here are indistinguishable from cases seeking to hold owners or sellers of firearms responsible for crimes committed using stolen or purchased weapons. That theory has been expressly and consistently rejected by this state's courts, and any change to that settled doctrine should come only from the legislature, not the courts.

I. FLORIDA LAW IMPOSES NO DUTY TO PREVENT A THIRD-PARTY ATTACK ON A STRANGER.

A. This Court has recognized that it is one of "the basic principles" of Florida law that "there is no common law duty to prevent the misconduct of third persons." *Trianon Park Condo. Ass'n v. City of Hialeah*, 468 So. 2d 912, 918 (Fla. 1985) (citing Restatement § 315). That fundamental no-duty rule leaves no doubt that

– absent a special relationship with the victim or the attacker – a defendant cannot be held liable in negligence for a third-party attack, even if a plaintiff alleges some connection by the defendant to the means or methods used in the attack.

The no-duty rule applies whether the alleged negligence is a failure to stop an attack once it is underway, or a failure to prevent the attacker from preparing for the attack (such as by obtaining a weapon) in the first instance. Thus, victims of gun violence cannot sue the distributor of a firearm used in an attack, as the Fourth District Court of Appeal recently held: "there is no duty to prevent the misconduct of a third party absent a special relationship." *Grunow v. Valor Corp.*, 904 So. 2d 551, 555 (Fla. 4th DCA), *review denied*, 918 So. 2d 292 (Fla. 2005).

Grunow is only the most recent example. Florida courts have consistently held that there is no duty to prevent a third party attacker from obtaining a gun later used to harm another person, absent a special relationship.[1] *See, e.g.*, *Keenan v. Oshman Sporting Goods, Co.*, 629 So. 2d 210 (Fla. 5th DCA 1993) (per curiam) (affirming summary judgment that Florida law imposed no duty on store to prevent theft of guns from defective display case); *id.* at 210-211 (Dausch, J., dissenting) (dissenting and unsuccessfully urging position that "all sellers of handguns owe an extraordinary duty

[1] The district courts of appeal have been unanimous in firearm cases, and there has thus been no occasion for this Court to address the question. "The decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by this Court . . . ." *Stanfill v. State*, 384 So. 2d 141, 143 (Fla. 1980), quoted in *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992). That rule "preserve[s] stability and predictability in the law." *Pardo*, 596 So. 2d at 666 (internal quotation marks omitted).

to the public at large to prevent the theft of their wares"); *Mathis v. American Fire & Cas. Co.*, 505 So. 2d 652 (Fla. 2d DCA 1987) (husband not liable to shooting victim when he accidentally leaves gun in glove compartment of automobile and wife uses gun to shoot third party); *Trespalacios v. Valor Corp. of Florida*, 486 So. 2d 649, 651 (Fla. 3d DCA 1986) (dismissing claims against distributor and manufacturer of firearm used to commit murder because "neither the manufacturer nor distributor had a duty to prevent the sale of handguns to persons who are likely to cause harm to the public"); *Heist v. Lock & Gunsmith, Inc.*, 417 So. 2d 1041, 1042 (Fla. 1st DCA 1982) (firearms retailer had no duty to prevent sale of weapon in alleged "straw man" purchase), *review denied*, 427 So. 2d 736 (Fla. 1983).[2]

This case is indistinguishable from *Grunow*, *Keenan*, and the like. There, as here, plaintiffs alleged that a defendant who possessed a lawful product that could be used as a weapon should be held liable when a third party obtained that product and

[2] There is a narrow exception, which is not presented in this case. Florida courts have recognized that a plaintiff may recover under a theory of negligent entrustment where the defendant negligently entrusts a firearm, vehicle, or other dangerous instrumentality to a known incompetent person, who subsequently harms another. *See, e.g.*, *Kitchen v. K-Mart*, 697 So. 2d 1200 (Fla. 1997). Plaintiff has not alleged negligent entrustment here, and she could not do so because such a claim requires that the defendant have known that the specific third party was incompetent. *See, e.g.*, *Heist*, 417 So. 2d at 1042.

used it in an illicit attack on a stranger. It is no answer to suggest that the rules are different in the context of product liability claims. First, the courts' analyses and holdings in those cases focused on the *negligence* claims, not strict liability theories. Second, *Keenan* and *Mathis*, involving storage of weapons in circumstances that allowed theft, cannot be characterized as products liability cases. Third, even if there were some special rule for negligence claims involving weapons (and there is no support for such a distinction), that rule would apply here as well.

Plaintiff has not specified whether she intends to allege that: (1) the United States lawfully transferred anthrax to another person or facility, from which it was then improperly removed, which would resemble *Grunow*; (2) the United States consented to possession of anthrax by an individual who subsequently used it to attack Mr. Stevens, as in *Trespalacios* or *Heist*; or (3) the attacker or another person stole anthrax from the government, which would make this case more like *Keenan* or *Mathis*. Under any such theory, however, Florida courts have correctly rejected efforts by plaintiffs to hold lawful possessors of potentially dangerous instrumentalities liable for criminal attacks by third parties.

B. Despite the Florida case law we have cited, plaintiff argues that the no-duty rule would apply only if she had "alleged . . . that the Defendants failed to protect Robert Stevens from the criminal Anthrax attack through the mail," and not here, where she alleged "that the Defendants negligently failed to secure the Anthrax under their control." Pl. Br. 6; *see also, e.g., id.* at 15 ("Plaintiff has not alleged that these [defendants] failed to act to prevent criminal conduct but, rather, that their

unreasonable failure to secure the Anthrax created a foreseeable zone of risk which ultimately resulted in [Mr. Stevens'] death"). As the gun cases make clear, however, plaintiff's putative distinction is not supported by Florida law. The no-duty rule bars suits such as this one, in which a plaintiff seeks to impose liability for negligence leading to a third party's attack on a stranger.

The no-duty rule encompasses both categories of claims plaintiff seeks to distinguish. In addition to such cases as *Grunow* (involving claims of negligence leading up to an attack), the rule also precludes liability for failing to prevent an attack once it is underway. For example, in *Trianon Park*, the Court emphasized that "there has never been a common law duty to individual citizens for the enforcement of police power functions." 468 So. 2d at 914-915; *see also, e.g.*, *Everton v. Willard*, 468 So. 2d 936, 938 (Fla. 1985) ("The victim of a criminal offense, which might have been prevented through reasonable law enforcement action, does not establish a common law duty of care to the individual citizen and resulting tort liability, absent a special duty to the victim.").[3] But the no-duty rule is not limited to such allegations.

Other Florida cases likewise refute plaintiff's effort to narrow the no-duty rule. In *Lighthouse Mission of Orlando, Inc. v. Estate of McGowen*, 683 So. 2d 1086, 1088-

[3] Here, the United States can only be liable to the same extent that a private person would be liable under Florida law. Thus, plaintiff understandably has not sought to recover on a theory that the government should have arrested the anthrax attacker before Mr. Stevens was killed.

1089 (Fla. 5th DCA 1996), *review denied*, 697 So. 2d 510 (Fla. 1997), plaintiffs alleged that the owner of a halfway house owed a duty to prevent a neighbor's murder by a former resident of the house. The court rejected that claim, and the decision did not turn on the type of negligence alleged. Indeed, the attack there took place after the attacker had moved out, and any potentially relevant negligence could only have occurred far earlier, such as a claim that the owner of the house was negligent in permitting the murderer to live there in the first instance.

And in *Gross v. Family Servs. Agency, Inc.*, 716 So. 2d 337, 338 (Fla. 4th DCA 1998), *aff'd sub nom. Nova Southeastern Univ., Inc. v. Gross*, 758 So. 2d 86, 90 (Fla. 2000), the District Court of Appeal recognized that a defendant "generally has no duty to take precautions to protect another against criminal acts of third parties," in the absence of a special relationship (which the court found to exist between a student and a university). The plaintiff in *Gross* did not allege that the university should have protected her while she was under attack in the parking lot. Instead, the claim there was that the university facilitated the crime by placing the plaintiff in proximity to the attacker, just as plaintiff in this case claims that the government facilitated the murder of Mr. Stevens by possessing anthrax somehow linked to the attacker's weapon.[4]

[4] This Court's decision on a limited certified question in *Gross* – finding a special relationship between the plaintiff victim and the defendant university in that case – did not reach, but implicitly confirmed, the underlying no-duty rule.

C. The no-duty rule has also been invoked to bar other types of suits, such as claims that a third party's negligence (or other tortious conduct, short of an intentional criminal attack) caused harm to a stranger. For example, alleged negligence in failing to prevent a thief from stealing a vehicle was not sufficient to impose liability on the owners of a gym for the subsequent harm caused by the thief when operating the stolen vehicle. *See Michael & Philip, Inc. v. Sierra*, 776 So. 2d 294, 297 (Fla. 4th DCA 2000) ("The general rule under common law is that there is no duty to prevent the misconduct of third persons."), *review denied*, 792 So. 2d 1215 (Fla. 2001); *see also, e.g.*, *Horne v. Vic Potamkin Chevrolet, Inc.*, 533 So. 2d 261 (Fla. 1988); *Aguila v. Hilton, Inc.*, 878 So. 2d 392, 397 (Fla. 1st DCA), *review denied*, 891 So. 2d 549 (Fla. 2004).

Plaintiff makes no mention of *Michael & Philip, Horne,* or *Aguila*, but cites a case allowing a rental car company to be sued for injuries sustained when a stolen rental car crashed into the plaintiff's vehicle. *See* Pl. Br. 29-31, citing *Hewitt v. Avis Rent-A-Car System, Inc.*, 912 So. 2d 682 (Fla. 1st DCA 2005). Plaintiff also cites *Whitt v. Silverman*, 788 So. 2d 210 (Fla. 2001), finding that a landowner owed a duty of care to prevent motorists from negligently injuring pedestrians on adjacent property. *See* Pl. Br. 12-13; see also *id.* at 11-12, citing *Henderson v. Bowden*, 737 So. 2d 532 (Fla. 1999) (sheriff's deputy owed duty of care to prevent intoxicated motorist from crashing). But *Hewitt*, *Whitt*, and *Henderson* did not address the no-duty rule at all, and had no occasion to discuss or distinguish such cases as *Grunow*,

Gross, *Lighthouse*, or any of the other cases in which Florida courts have consistently applied the no-duty rule to third-party criminal conduct.

Even under plaintiff's theory, looking solely to foreseeability, *Hewitt*'s, *Whitt*'s, and *Henderson*'s allegations of negligent driving are plainly distinguishable from plaintiff's allegations here that a laboratory should have foreseen (sometime before 2001) a criminal attack as a consequence of the loss or theft of anthrax. *See* Restatement (Second) of Torts § 302B, cmt. d (1965) ("Normally the actor has much less reason to anticipate intentional misconduct than he has to anticipate negligence. . . . This is true particularly where the intentional misconduct is a crime, since under ordinary circumstances it may reasonably be assumed that no one will violate the criminal law.").[5] Here, the relevant third-party conduct was a sophisticated and calculated attack by an unknown murderer, against a stranger (Mr. Stevens) located half a continent away. The rule set forth in such cases as *Grunow* leaves no doubt that the government owed Mr. Stevens no special duty to prevent that attack, irrespective of bald assertions of foreseeability. Injuries resulting from the mere *negligence* of a third party may or may not require a different rule, and there is thus no occasion for this Court to address whether *Michael & Philip* or *Hewitt* was correctly decided. But

[5] As we explained in our initial brief, § 302B addresses whether conduct is negligent, not whether a defendant owed a duty. *See* Gov't Br. 25. Nevertheless, the distinction in comment d refutes the notion that foreseeability analysis – even if it were relevant to the duty inquiry in this case – could support plaintiff's theory. *See also* Gov't Br. 21-22 n.4 (noting that the attack here was unforeseeable by any measure).

as the Restatement acknowledges (*see* § 302B, cmt. d), criminal conduct is different, and the common law does not hold a law-abiding person to blame for the actions of a third-party criminal, absent a special relationship.

Holding a laboratory responsible for Mr. Stevens' murder is no different from holding a gun owner (or seller) liable for the conduct of a murderer using a stolen (or purchased) firearm. Holding lawful owners of legitimate products liable for crimes committed by third parties using those products as weapons – whether stolen, borrowed, or purchased – would represent an enormous extension of legal liability in the law of this state. Such a step should be undertaken only by the legislature, not the courts. *See*, *e.g.*, *Grunow*, 904 So. 2d at 557 ("While Grunow's proposed theory of duty may sound reasonable, the legislature is better suited and can more appropriately address this issue, which would necessarily include a societal cost/benefit analysis."). And plaintiff here has made no effort to justify any such extension of Florida negligence law.

II. PLAINTIFF CANNOT EVADE THE NO-DUTY RULE.

Plaintiff's answer brief largely ignores the no-duty rule, and discusses instead cases that have nothing to do with third parties. The case law plaintiff invokes offers no insight into the claim here, which seeks recovery in negligence from a lawful owner of a potentially hazardous substance for an attack by a third-party criminal using that substance or another derived from it.

Plaintiff looks back nearly a century to *J.G. Christopher Co. v. Russell*, 58 So. 45 (Fla. 1912), to reiterate undisputed principles governing duty where there are no

third parties involved. *See* Pl. Br. 6-7. But neither that well-established precedent nor this Court's decision in *McCain v. Florida Power Corp.*, 593 So. 2d 500 (Fla. 1992), *see* Pl. Br. 8-10, offers any insight into the present dispute. The Court in *J.G. Christopher* and *McCain* had no occasion to consider the effect of the no-duty rule. Neither *McCain* nor any other Florida case cited by plaintiff supports the assertion that negligence preceding a third-party criminal attack, even a foreseeable third-party criminal attack, is actionable absent a special relationship.

Plaintiff also invokes cases involving escaped animals and hazardous chemicals. *See* Pl. Br. 19-23. But none of those cases involved a third-party criminal attack. Instead, those cases involved harm done by the animal or substance itself, without the action of a third-party criminal directing it. Mr. Stevens was not injured by anthrax carried downwind without human intervention. He was the victim of a sophisticated crime of murder. If, for example, the monkey in *Scorza v. Martinez*, 683 So. 2d 1115 (Fla. 4th DCA 1996), had been captured by a third party and carefully trained to attack another person – or if the steers in *Loftin v. McCrainie*, 47 So. 2d 298 (Fla. 1950), had been deliberately stampeded toward the rustler's victim – then those cases might have some significance (although the firearms cases, such as *Grunow*, *Keenan*, and the like, are more relevant). But *Scorza* and *Loftin* were not about third-party attacks. Likewise, strict liability cases involving dangerous chemicals or similar substances are not relevant when they do not involve the deliberate use of such materials as a weapon by a third-party criminal.

It is no answer to suggest that a laboratory creates a zone of risk merely by possessing and studying anthrax. *See* Pl. Br. 14. Under that reasoning, a gun owner or dealer likewise creates a zone of risk encompassing all potential victims of an attacker who steals or purchases the firearm. Plaintiff's simplistic analysis does not answer the question presented here. Plaintiff suggests that this Court should adopt a special rule for hazardous items, but does not offer any legal or policy basis to support such a groundbreaking change in Florida law. First, as we have explained, any such rule would hold gun owners and sellers liable for crimes committed by third parties – a result that this state's courts have consistently rejected. Second, it is improper to extend theories of strict liability to the field of negligence. The Supreme Court of the United States has rejected a plaintiff's attempt to "dress[] up the substance of strict liability for ultrahazardous activities in the garments of common law trespass." *Laird v. Nelms*, 406 U.S. 797, 802 (1972). Indeed, the complaint in this case originally included a count of strict liability. *See* RE 1:2-5. As plaintiff later conceded, however, such a claim cannot be maintained against the United States because the Federal Tort Claims Act does not waive the government's sovereign immunity from such claims. *See*, *e.g.*, *Laird*, 406 U.S. at 802.

Plaintiff also persists in the act/omission (or misfeasance/nonfeasance) distinction invoked by the federal courts. *See* Pl. Br. 15-18; 24-26. That dichotomy is untenable and unhelpful, because the provisions relied on to support it (Restatement §§ 302, 302A, and 302B) are intended to determine whether particular conduct is negligent, not whether a defendant owed a duty, and those Restatement provisions

encompass both acts and omissions. Moreover, the complaint in this case alleges negligence in the form of omissions, not merely actions – demonstrating the inherent malleability of the distinction. *See* Gov't Br. 24-28. Plaintiff offers no response to our argument, but merely repeats the uninformative distinction in her brief. Under plaintiff's theory, gun owners and sellers would be liable for the criminal acts of those who steal or purchase a weapon, on the theory that the possession of a firearm constitutes affirmative conduct, and that failing to secure such dangerous instrumentalities renders the possessor liable for any subsequent improper use of the weapon by a third party. That is not the law in Florida.

Implicitly recognizing that Florida law offers no support for her novel theory here, plaintiff cites a case decided by a New Jersey court, holding a firearm dealer liable for murders committed by third parties who stole guns from the dealer. *See* Pl. Br. 31-32, citing *Gallara v. Kokovich*, 836 A. 2d 840 (N.J. Super. 2003). But *Gallara* directly conflicts with *Keenan*. And the New Jersey court in *Gallara*, 836 A. 2d at 852, acknowledged that it was creating a *new* duty of care not previously recognized even in that state. Florida courts are rightly reluctant to undertake such freewheeling expansion of common law principles, instead recognizing that the legislature is the proper source for new theories of liability. *See Grunow*, 904 So. 2d at 557. *Gallara* also relied on New Jersey's extensive and specific legislative restrictions on gun ownership and sales.[6]

[6] Likewise, we explained in our initial brief (Gov't Br. 31-34) that the federal district court was wrong to rely on *In re September 11 Litigation*, 280 F. Supp. 2d 279

Plaintiff (Pl. Br. 16-17) cites Restatement § 302B, although that provision "is concerned only with the negligent character of the actor's conduct, and not with his duty to avoid the unreasonable risk." Restatement (Second) of Torts § 302, cmt. a, cited in *id.* § 302B, cmt. a. The fact-intensive question whether particular conduct is negligent does not answer the preliminary legal question whether the defendant was under a legal duty. *See* Gov't Br. 25. As the Restatement comment explains, "[i]f the actor is under no duty to the other to act, his failure to do so may be negligent conduct within the rule stated in this Section, but it does not subject him to liability, because of the absence of duty." Restatement (Second) of Torts § 302, cmt. a.

And plaintiff's effort to avoid the effect of Restatement § 314's no-duty rule is unavailing. The anthrax used to murder Mr. Stevens was *not* "within the exclusive control of" the United States. Pl. Br. 17. The complaint here includes no such claim. Allegations of exclusive control come within an express exception to § 314's no-duty rule – where a defendant expressly and actively controls the mechanism that harms the victim. *See* Restatement (Second) of Torts § 314, cmt. d ("The rule stated in this

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(S.D.N.Y 2003), and to invent a new duty owed to the public generally. *See* RE 47:17 (concluding that the government was under a duty to protect "the public at large which is realistically and foreseeably at risk in the event that a deadly organism or contagion is released"). Notably, plaintiff does not attempt to defend that rationale, which finds no support in Florida law.

Section applies only where the peril in which the [victim] is placed is not due to any active force which is under the [defendant's] control."). But Mr. Stevens was not an incompetent person who wandered into a government laboratory and was about to approach hazardous anthrax. Compare *id.* § 314, cmt. d, Illus. 2 ("A, a factory owner, sees B, a young child or a blind man who has wandered into his factory, about to approach a piece of moving machinery."). Indeed, plaintiff has expressly alleged the contrary in her complaint, recognizing that the weapon used to murder Mr. Stevens was outside the control of the government. *See* RE 1:12 ("anthrax was obtained . . . and a portion of it was sent to [the] employer of ROBERT STEVENS, where MR. STEVENS was then exposed to the anthrax and died"). Plaintiff's complaint also observed that the government was not the only laboratory that studied anthrax. *See* RE 1:5 (alleging that the United States "was in the business of . . . transporting [and] distributing . . . anthrax"); RE 1:7 (alleging that the United States "forwarded [anthrax] to other laboratories, schools and companies"); *see also* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 § 511(a)(4) (April 24, 1996), 110 Stat. 1284 (recognizing the importance of research involving anthrax, a bacterium that occurs naturally in the soil, in such fields as agricultural sciences, genetics, and medicine, and specifically providing by statute that distribution of anthrax (among other potentially hazardous biological agents) should be regulated, but that such regulations must "ensure that individuals and groups with legitimate objectives continue to have access to such agents for clinical and research purposes").

Plaintiff erroneously accuses the government of confusing duty and causation. *See* Pl. Br. 28. But any confusion has been caused by plaintiff's blindered focus on foreseeability. As this Court has observed, "foreseeability relates to duty and proximate causation in different ways and to different ends." *McCain*, 593 So. 2d at 502-503. Plaintiff is mistaken to rely solely on foreseeability, because the subsequent criminal attack on Mr. Stevens removes the duty inquiry here from a simple question of foreseeability. In any event, a criminal attack using anthrax was not foreseeable. *See* Gov't Br. 21-22 n.4. Such an attack (which had never before occurred in the United States) was certainly less foreseeable than a murder using a firearm, which occurs daily, and the *Grunow* court observed that the killer's "criminal conduct" was not "a foreseeable event which Valor should have expected." 904 So. 2d at 556.

CONCLUSION

For the foregoing reasons, and those set forth in the government's initial brief, this Court should answer the certified question in the negative, confirming that Florida law does not impose a duty of care to prevent a third party's criminal attack on a stranger.

Respectfully submitted,
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NOVEMBER 2007

CERTIFICATE OF SERVICE

I hereby certify that I have, this 20th day of November, 2007, served two copies of the foregoing Reply Brief For Appellant The United States of America, by sending them by First Class Mail, postage prepaid, to counsel listed below.

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